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No. 80-529

In the Supreme Court of the United States

October Term, 1980

CALGON CORPORATION,
Petitioner

v.

LAWRENCE E. DAVIS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent's Brief In Opposition

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CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, filed on August 1, 1980, upon panel rehearing, is reported at 627 F.2d 674. Neither the original opinion of the Court of Appeals, filed on June 10, 1980, nor the opinion of the United States District Court for the Western District of Pennsylvania is officially reported.

STATEMENT OF THE CASE

Respondent, Lawrence E. Davis, was employed by Petitioner, Calgon Corporation, for twenty-one years, rising to the position of Vice President and General Manager of Calgon's Activated Carbon Division. Beginning in March, 1977, when he was 54 years of age, Davis was gradually deprived of corporate responsibilities and privileges at Calgon and was finally terminated, effective June 30, 1978, at the age of 55.

Charging that he had been demoted and terminated solely on account of his age and in furtherance of a planned policy of discrimination by Calgon against its executives between the ages of 55 and 60, Davis filed a complaint with the Pennsylvania Human Relations Commission (PHRC) on January 29, 1979 (213 days after his termination) under Pennsylvania's age-discrimination statute, Pa. Stat. Ann. tit. 43, §§955-957 (Supp. 1964, 1978, and 1979). Ten days later, Davis filed a charge with the Secretary of Labor under the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621 *et seq.* (1976).

Following receipt from the PHRC of a notice of disposition and from the Secretary of Labor of a notice of termination of conciliation efforts, Davis brought an action in the District Court for the Western District of Pennsylvania, alleging that Calgon had violated the ADEA. The District Court dismissed the suit on the ground that Davis's lack of "timely invocation of the State remedy" (App. A at la) deprived him of the right to

avail himself of the 300-day federal filing period otherwise available to plaintiffs in deferral states.[1]

On appeal by Davis, the Third Circuit, although conceding that "the issue is not free from doubt" (App. B at 10a), affirmed the district court's order because Davis did not file his charge with the state agency within 180 days after his termination.

On resubmission to the Third Circuit for panel rehearing following this Court's decision in *Mohasco Corp. v. Silver*, 447 U.S. ___, 100 S.Ct. 2486 (1980), the Court of Appeals reversed its earlier order dismissing the complaint and held instead that Davis's charge filed with the Secretary of Labor within 300 days of termination was timely filed under the ADEA, notwithstanding that the state-agency charge had not been filed within 180 days of his termination. Thereupon, Calgon Corporation petitioned this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

This Court's decision in *Mohasco, supra,* has effectively settled the issue here sought to be reviewed; and the Circuit Court opinion on rehearing is in full accord therewith.

The conflicting statutory interpretations which existed among several circuit courts prior to the *Mohasco* ruling have been specifically addressed and reconciled by this Court.

The issue presented by petitioner having thus been resolved, the petition should be denied.

ARGUMENT

1. This Court, in *Mohasco Corp. v. Silver,* has expressly rejected Petitioner's arguments.

In *Mohasco,* a case involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, this Court unequivocally held that so long as proceedings have been instituted with the

[1] Deferral states, such as Pennsylvania, are "States with agencies empowered to remedy age discrimination in employment." *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979).

appropriate state agency, a complainant is entitled to a full 300 days in which to file his federal charge, even where, as here, the state charge was initiated *more than* 180 days after the alleged unlawful employment practice occurred.

Calgon Corporation insists in the petition now pending that this Court's *Mohasco* holding is limited to Title VII cases and has no application in an ADEA case.[2] The *Mohasco* decision itself expressly stated otherwise. In footnote 16, this Court examined and disapproved the decision of the Eighth Circuit in *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975), a Title VII case cited with approval by Calgon in its Circuit Court brief. *Olson* held that, in order to preserve his rights, a complainant must file either his state or federal charge within 180 days of the alleged discriminatory act. In the same footnote, this Court observed that *Ciccone v. Textron, Inc.*, 616 F.2d 1216 (1st Cir. 1980), adopted substantially the same approach as *Olson* "under similar provisions in the Age Discrimination in Employment Act," 29 U.S.C. §§621-634. *Mohasco*, 447 U.S. at ___, 100 S. Ct. at 2491. As to both these judicial interpretations, this Court expressed the belief that "the restrictive approach [disallowance of the 300-day filing period] exemplified by *Olson* is not supported by the statute." *Id.*

The Third Circuit in its opinion following rehearing also understood *Mohasco* to have left the issue free from the doubt which had earlier troubled the Circuit Court:

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[2]In its attempt to distinguish *Mohasco*, Calgon's petition asserts that "*Mohasco* dealt with a definitional question unique to Title VII" (Pet. at 3) and emphasizes that the critical differences between the two statutes are more striking than the similarities. Yet Calgon's brief in the Circuit Court, written before this Court decided *Mohasco*, cites at least four Title VII judicial decisions in support of its interpretation of the ADEA filing requirements, contending, moreover, that this interpretation "is consistent with the overwhelming majority of holdings under the *nearly identical* language of Title VII." (Calgon's Brief for Appellee at 23, filed January 17, 1980) Emphasis added.

> While *Mohasco* involved the time limitations of Title VII, we find the Supreme Court's statements equally applicable to the ADEA.
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> * * *
>
> . . .[W]e find that the Supreme Court's statements in *Mohasco* control disposition of this issue.

Davis v. Calgon, supra, 627 F.2d at 676.

Calgon's claim, in its petition before this Court, that the Third Circuit's ruling is inconsistent with this Court's decision in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), is simply inaccurate. (Pet. at 6, 8, 9). *Oscar Mayer* established the principle that although ADEA requires a complainant to commence state proceedings, it does not require that the filing be timely under state law—an issue of importance in the instant action, since the Pennsylvania Human Relations Act requires the filing of discrimination charges within 90 days after the alleged unlawful act. Moreover, this Court's statement in *Oscar Mayer* confirms the relevancy of the *Mohasco* ruling in an ADEA action:

> Since the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace; since the language of §14(b) [§633(b) of the ADEA] is almost *in haec verba* with §706(b), and the legislative history of §14(b) indicates that its source was §706(b), we may properly conclude that Congress intended that the construction of §14(b) should follow that of §706(b).

441 U.S. at 756.

Both the Supreme Court's decision in *Mohasco* and the Circuit Court's opinion in the case at issue rest on a plain reading of the statutes involved. The language of both statutes in unambiguous. As this Court observed in *Mohasco*, at 447 U.S. ___, 100 S.Ct. 2491, n.19:

> Congress included no express requirements that state proceedings be initiated by any specific date in the portion of the subsection that relates to time limitations in deferral states.
>
> * * *
>
> . . .[W]e do not believe that a court should read in a time limitation provision that Congress has not seen fit to include, . . . at least when dealing with "a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527. In contrast to the construction of the statute we adopt today, the . . . approach urged upon us by petitioner . . . is not compelled by the plain meaning of the statutory language.

The plain meaning of Section 626(d) of the ADEA was complied with by Respondent Davis, who filed his complaints with the state and federal governments within the time set forth in that section.

2. Opinions relied upon by petitioners have been vacated and remanded by this Court in light of *Mohasco*.

Calgon bases its request for grant of a writ of certiorari primarily on the "irreconcilable conflict" existing between the Third Circuit's decision below and ADEA cases in two other circuit courts disallowing the full 300-day filing period to persons who do not initiate state proceedings within 180 days after termination of employment. *Ciccone v. Textron, Inc., supra*, and *Ewald v. Great Atlantic & Pacific Tea Co., Inc.*, 620 F.2d 1183 (6th Cir. 1980).

Lest any doubt remain that the *Mohasco* holding directly applies to ADEA cases, we observe that this Court recently granted petitions for certiorari in both *Ciccone* and *Ewald*, vacated the judgments of the First and Sixth Circuits in those cases, and remanded "for further consideration in light of

Mohasco." *Ciccone*, No. 79-1970, 48 L.W. 3288 (October 21, 1980); *Ewald*, No. 80-208, 48 L.W. 3288 (October 21, 1980).

The Ninth Circuit has also addressed the issue presented in this petition, and its decision, in *Bean v. Crocker Nat'l. Bank*, 600 F.2d 754 (9th Cir. 1979), is in accord with the Third Circuit's holding and with *Mohasco.*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied and the action remanded for trial.

Respectfully submitted,

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